Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

MICHAEL J. LIGHTMAN, et al.,

Petitioners,

v.

ZENITH INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the McCarran-Ferguson Act bars federal civil RICO suits in federal court which seek redress for alleged wrongs committed within California's workers' compensation system when California law expressly prohibits such civil tort suits in California's state courts because of the exclusivity of California's workers' compensation system.

PARTIES INVOLVED

The parties involved are as follows:

Michael J. Lightman, Excalibur Ventures, Inc., Lien Collections, Inc., James W. Eisenberg, James W. Eisenberg Medical Corporation, Robert Yale Libott and Robert Yale Libott, a Law Corporation (collectively "petitioners").

Zenith Insurance Company ("respondent").

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OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is unreported. The order of the district court (Appendix B) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 11, 1996. A timely petition for rehearing was denied on November 21, 1996. (Appendix C). A motion to file a second petition for rehearing because of a new California appellate court decision directly on point was denied on February 5, 1997. (Appendix D). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides, in relevant part: "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . . "

Relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, and of other legislation referenced herein are set forth in Appendices E (McCarran-Ferguson Act), F (Racketeer Influenced and Corrupt Organizations Act), G (California Workers' Compensation Act, Labor Code) and H (California Insurance Code).

STATEMENT OF THE CASE

On October 20, 1992 Zenith Insurance Company ("Zenith") commenced suit in the federal district court against petitioners under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* ("RICO"), to recover alleged overpayments it made on 45 workers' compensation claims because of alleged fraudulent billings, and to recover its attorneys fees and costs incurred in its handling of these workers' compensation claims.

The petitioners comprise three separate groups who were all involved in California's workers' compensation system. James W. Eisenberg and James W. Eisenberg Medical Corporation (collectively "Eisenberg") provided medical services to injured workers. Michael J. Lightman, Excalibur Ventures, Inc. and Lien Collections, Inc. (collectively "Lightman") provided management and lien collection services for Eisenberg. Robert Yale Libott and Robert Yale Libott, a Law Corporation (collectively "Libott") provided legal services to Eisenberg.

Petitioners moved to dismiss Zenith's suit on the ground that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, barred Zenith's RICO suit. The district court agreed and granted petitioners' motion. The court of appeals reversed on the sole ground that application of RICO would not invalidate, impair or supersede California's workers' compensation system.

JURISDICTION BELOW

The district court had jurisdiction pursuant to 18 U.S.C. § 1964(a) and 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

California statutory and case law state, without equivocation, that civil redress of the kind sought by Zenith for alleged wrongs committed within California's workers' compensation system are to be exclusively determined within that workers' compensation system. The court below ignored this unambiguous California law, as well as relevant decisions of the Court and other federal courts, and held that RICO can be used by Zenith in a federal court to secure civil redress for alleged wrongs committed by petitioners within California's workers' compensation system. The net effect of the court below's decision is to open the federal courts in California, as well as in the rest of the Ninth Circuit, to civil claims under RICO for alleged wrongs committed within a state's workers' compensation system. Federal district courts will be called upon to adjudicate the very issues mandated by California law to be exclusively determined by California's Workers Compensation Appeals Board ("WCAB") if the decision of the court below stands.

Whether the McCarran-Ferguson Act precludes RICO civil suits involving California's workers' compensation system in federal courts in California, when such suits cannot be brought in California's state courts, raises a substantively important federal jurisdiction issue which has far reaching implications and ramifications on state

regulation of state workers' compensation systems, as well as upon the business of the federal courts.

In addition, because the Ninth Circuit seemingly stands alone in its willingness to sanction such use of RICO in federal court, despite the McCarran-Ferguson Act, a need for creating uniformity as to federal jurisdiction in this area now exists. Whether a right exists to pursue a claim in federal court under federal law for alleged wrongs committed within a state's workers' compensation system cannot, and should not, be dependent upon which circuit is involved. If those involved in workers' compensation systems in states outside the Ninth Circuit are protected from RICO suits by the McCarran-Ferguson Act, so too should those involved in California's workers' compensation system be so protected. Only the Court can now resolve this federal jurisdiction issue and define the scope of the McCarran Ferguson Act's protection in this context.

I.

The Decision Of The Court Below Conflicts With Decisions By The California Supreme Court And California Courts Of Appeal Regarding The Exclusivity Of The California Workers' Compensation System

It is well established that a refusal by the court of appeals to follow decisions of a state's intermediate appellate court on matters as to which state laws and decisions are applicable warrants the granting of certiorari. *Six Companies v. Joint Highway Dist. No. 13,* 311 U.S. 180, 188 [61 S.Ct. 186, 188, 85 L.Ed.2d 114] (1990).

In *Marsh & McLennan, Inc. v. Superior Court*, 49 Cal.3d 1, 5-6 [259 Cal.Rptr. 733] (1989), the California Supreme Court stated:

> The Workers' Compensation Act (Act), codified in section 3201 et seq. of the Labor Code, sets forth an elaborate scheme for the compensation of California employees injured in the course and scope of their employment. Labor Code section 3602 expressly states that the right to recover workers' compensation benefits is "the sole and exclusive remedy" available to an injured employee against his employer. Moreover, the WCAB has exclusive jurisdiction over the disputes regarding an employee's right to compensation or the liability of an employer. (§ 5300, subds. (a) & (b).)
>
> The exclusive remedy provisions of the system are designed to provide "a quick, simple and readily accessible method of claiming and receiving compensation." (*Everfield v. State Comp. Ins. Fund* (1981) 115 Cal.App.3d 15, 20, [171 Cal.Rptr. 164].)

Insurance companies play a key role in this workers' compensation system. *See* Cal. Lab. Code §§ 3700(a), 3753 and 3755. In *Unruh v. Truck Insurance Exchange*, 7 Cal.3d 616, 627 [102 Cal.Rptr. 815] (1972), the California Supreme Court stated with respect to that role:

> Like safety inspections or the providing of medical care, such nonmedical investigation constitutes a service "inextricably interwoven" with the insurer's status. In our system of compensation, no one else is in a better position, with resources at command, to detect fraudulent, or grossly exaggerated claims for benefits.

> No other party has the financial motivation for avoiding liability for spurious claims, since the insurer is ordinarily substituted for the employer and assumes his compensation liability. (Lab. Code §§ 3755-3758.) The detection of spurious and unfounded claims benefits the workmen's compensation scheme by excluding them from the already heavily burdened administrative process of the Board.

In addition to insurers, lien claimants such as petitioners are also considered parties in interest under the California Workers' Compensation Act, *Independence Indem. Co. v. Industrial Acc. Com.*, 2.Cal.2d 397 [41 P.2d 320] (1935), and are subject to the WCAB's jurisdiction. *American International Adjustment Co., Inc. v. Crawford*, ___ Cal.App.4th ___ [60 Cal.Rptr.2d 123, 126] (1997).

Thus, everything of which Zenith complains, namely the submission of alleged fraudulent billings to settlement or adjudication of such billings, is regulated by the California Workers' Compensation Act. The WCAB routinely determines the reasonableness of physicians' bills, and reduces the amount of these bills if it agrees with the objecting party. Cal. Lab. Code § 4621 (the WCAB may only award payment for services "reasonably, actually and necessarily incurred"); *Turudich v. Industrial Acc. Com.*, 237 Cal.App.2d 455, 458 [47 Cal.Rptr. 21] (1965).

In determining whether a claim falls within the jurisdiction of the WCAB, all doubt must be resolved in favor of the WCAB's jurisdiction. *Mitchell v. Scott Wetzel Services, Inc.*, 227 Cal.App.3d 1474, 1480 [278 Cal.Rptr. 474] (1991); *Foremost Dairies, Inc. v. Industrial Acc. Comm.*, 237 Cal.App.2d 560 [47 Cal.Rptr. 173] (1965). If a dispute is

connected to the payment of workers' compensation benefits, it falls within the exclusive jurisdiction of the WCAB. *Mitchell v. Scott Wetzel Services, Inc., supra* at 1481; Cal. Lab. Code §§ 4625 and 5300.

Efforts in California courts to inject RICO into this system, or to otherwise avoid the WCAB through civil litigation, have all been rejected. In *American International Group, Inc. v. Superior Court,* 234 Cal.App.3d 749 [285 Cal.Rptr. 765] (1991), *cert. denied,* 504 U.S. 911 [112 S.Ct. 1944, 118 L.Ed.2d 549] (1992), the court of appeal issued a writ of mandate directing the trial court to dismiss a policyholder's RICO suit against its workers' compensation carrier for alleged misrepresentation in the sale of the policy. The court held that allowance of a RICO suit would invalidate, impair or supersede California insurance law. As stated by the court:

> California has enacted comprehensive legislation expressly designed to regulate the business of insurance. Indeed, it was initially enacted in 1959 in direct response to McCarran-Ferguson. That legislation expressly includes as a prohibited act the very conduct which is asserted here by Brutoco as the basis for its RICO claim. However, it does not provide for a private right of action, but rather only administrative remedies. (*Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 304-305 [250 Cal.Rptr. 116, 758 P.2d 58]; *Tricor California, Inc. v. Superior Court* (1990) 220 Cal.App.3d 880, 882-883, 885-888 [269 Cal.Rptr. 642].)
>
> California has also specifically undertaken extensive legislative control and regulation of

> workers' compensation insurance rates, including premium refunds and dividends. . . .

Id. at 764-765.

> Allowance of a RICO action seeking civil damages (including treble damages and attorney fees) for the very conduct which California has chosen to regulate administratively would subvert and subsume the existing statutory scheme. It would permit a civil damage recovery where our Supreme Court has recently and explicitly held that none was intended. (*Moradi-Shalal v. Firemen's Fund Ins. Co., supra,* 46 Cal.3d at pp. 304-305.) This would not be the first time that creative litigation efforts had been unsuccessfully expended to get around that decision. *See e.g., Maler v. Superior Court* (1990) 220 Cal.App.3d 1392, [270 Cal.Rptr. 222] (where we held that a statutory bad faith claim for damages could not be recast as unfair competition and prosecuted under Bus. & Prof, Code section 17200, et seq.)

Id. at 767-768.

There is no way to reconcile the court below's decision herein with *American International,* none whatsoever. That is because under California law it is the WCAB which has the *exclusive* jurisdiction to determine the propriety of medical bills generated in the workers' compensation system. Cal. Lab. Code §§ 3201, *et seq.; Marsh & McLennan, Inc. v. Superior Court, supra; American International Adjustment Co., Inc. v. Crawford, supra; American Psychometric Consultants v. Workers' Comp. Appeals Bd.,* 36 Cal.App.4th 1626 [43 Cal.Rptr.2d 254] (1995). Moreover, California's regulation of this system is comprehensive. It

includes a workers' compensation fraud reporting system (Cal. Ins. Code § 1877, *et seq.*), criminal penalties for making false or fraudulent claims (Cal. Ins. Code § 1871.4), a detailed civil action procedure (Cal. Ins. Code § 1871.7) and restitution of compensation resulting from fraudulent conduct (Cal. Ins. Code § 1871.5). The analysis of RICO's impact set forth in *American International* is directly applicable. At a minimum, the court below should have addressed this California law in its decision.

In a case decided after briefing was concluded, but raised at oral argument, *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd., supra,* the court addressed the issue of whether the type of relief sought by Zenith herein could be claimed apart from California's workers' compensation system. Rejecting such effort, the court stated:

> It has to be possible to eliminate fraudulent claims for medical-legal evaluations without destroying the entire workers' compensation system. Of most concern here is the element of transactional stability. We believe transactional stability an important element of any benefit system. Approving restitution in these cases would set a precedent which would have unfortunate consequences for the workers' compensation system. It would introduce the possibility of continued transactional instability so negative it would impact the number of medical providers willing any longer to participate in the system by evaluating workers with industrial injuries. No one can operate a business on receipts only conditionally possessed, and medical providers are no exception. Thus we have

> determined the restitution orders were unfair and must be annulled.

Id., 36 Cal.App.4th at 1647.

If the court below's decision is allowed to stand the "transactional stability" which *American Psychometric* held to be "an important element" of California's workers' compensation system will be destroyed. Indeed, the court's concern in *American Psychometric* about medical providers being willing to participate in the workers' compensation system in the absence of this "transactional stability" is real. The court below simply ignored this case, as well as all California law, in its decision.

On January 13, 1997, the California court of appeal, in *American International Adjustment Co., Inc. v. Crawford, supra,* expressly rejected the type of suit brought by Zenith. As stated by the court:

> Compensation for work-related injuries should be swift and sure, employers and workers have agreed. Fraudulent medical-legal claims corrupt this bargain by penalizing insurers who pay medical bills rather than challenge them. The net effect: soaring workers' compensation premiums, higher transaction costs, and reduced benefits for injured workers.
>
> We are sensitive to the delicate balance between combating fraud against employers and providing speedy and adequate compensation to employees. So, too, is the Legislature which, in recent years, has enacted a series of carefully tailored measures to investigate suspicious medical claims and to eliminate fraudulent ones.

It is for this reason that we are unwilling to sanction the crude, blunderbuss type of tort weapon plaintiff proposes. Plaintiff, workers' compensation insurer, filed a massive tort lawsuit against a group of medical clinics that allegedly engaged in fraudulent billing practices in 158 separate workers' compensation claims. The trial court sustained the demurrer on the ground that the California workers' compensation system preempted the civil claims. Plaintiff also filed a parallel action for reimbursement for the same 158 claims through the workers' compensation system.

We affirm the judgment of dismissal of the tort suit. The exclusive jurisdiction of the Workers' Compensation Appeals Board (WCAB) is not limited to employees and employers, but extends to all suits over compensation and payment of benefits to injured workers. Just as the WCAB's jurisdiction covers bad faith or fraud claims against workers' compensation carriers, so too it covers fraud claims against medical or medical-legal lien claimants.

Fraudulent workers' compensation claims should be stopped at the source, in the workers' compensation system. Medical clinics that submit false medical-legal evaluations can be detected and halted under existing law, which sets up a tripartite scheme involving the WCAB, the insurance commissioner and public prosecutors.

Id., 60 Cal.Rptr.2d at 125-126.

Zenith has candidly admitted that it brought its RICO suit in the federal district court because of dissatisfaction with remedies in the California workers' compensation system, (R.T. July 20, 1993, at 14: 12-21, Appendix I), and that its purpose in bringing its RICO suit is to recover costs and attorneys' fees expended in dealing with workers' compensation claims in California's workers' compensation system. *Id.* Whether Zenith can use RICO for that purpose is a question of exceptional importance because its answer will impact significantly both the California workers' compensation system and the business of the federal district court.

California has said that redress of the type claimed by Zenith for the wrongs alleged by Zenith is to be found exclusively within California's workers' compensation system, and not in California's judicial system. *American International Adjustment Co., Inc. v. Crawford, supra,* 60 Cal.Rptr.2d at 125-126. California has also said that application of RICO to California's workers' compensation system would "impair, invalidate or supersede" that system. *American International Group Inc. v. Superior Court, supra,* 234 Cal.App.3d at 767-768. However, unless the Court now grants certiorari, California's efforts to regulate and control its workers' compensation system will be for naught because RICO will be available in federal courts in California as a federal remedy for anyone who believes he or she was wronged in California's workers' compensation system.

II.

The Decision of The Court Below Conflicts with Decisions Of Other United States Courts of Appeals and Federal District Courts On the Applicability Of The McCarran-Ferguson Act To The Business Of Insurance

The question of whether federal courts will be open to RICO suits which seek redress for alleged wrongs committed within a state's workers' compensation system, or within a similar highly regulated aspect of a state's "business of insurance", is of significant importance throughout the United States. At present, there are conflicting views in the courts of appeals and district courts on this issue. This conflict warrants certiorari being granted. *Calhoun v. Harvey,* 379 U.S. 134, 137 [85 S.Ct. 292, 295, 12 L.Ed.2d 190] (1964).

In addition, there is an almost uniform reluctance by both federal and state courts to inject RICO into a state's regulation of the "business of insurance." Accordingly, the decision of the court below is "out of line with the authorities," thus warranting the granting of certiorari. *Braen v. Pfeifer Oil Transportation Co.,* 361 U.S. 129, 130 [80 S.Ct. 247, 248, 4 L.Ed.2d 191] (1959).

Federal and state courts have adopted a four-part test to determine whether Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), will apply to preclude a suit based upon a federal statute. Preclusion will occur if: (1) the federal law does not relate to the "business of insurance"; (2) the complained of activity involves the "business of insurance"; (3) the state has enacted legislation for the purpose of regulating that aspect of the

"business of insurance," and, (4) application of the federal law would "impair, invalidate or supersede" such state legislation. *Merchants Home Delivery Service, Inc. v. Frank B. Hall,* 50 F.3d 1486, 1489 (9th Cir. 1995), *cert. denied,* ___ U.S. ___ [116 S.Ct. 418, 133 L.Ed.2d 335] (1995); *American International Group, Inc. v. Superior Court, supra,* 234 Cal.App.3d at 749.

Inherent in the decision of the court below is the conclusion that the first three factors were met. It is the fourth factor alone, namely that allowance of a RICO suit will not "impair, invalidate or supersede" California's workers' compensation system, which forms the basis of the court below's decision.

The court below's decision is based entirely upon its decision in *Merchants Home, supra.* No other authority is cited or discussed. In *Merchants Home* the pertinent issue was whether a national shipping company's suit against its insurance broker under RICO was precluded by the McCarran-Ferguson Act, and specifically whether allowance of such suit would "impair, invalidate or supersede" California insurance law. *Merchants Home* held it would not because RICO prohibited the same acts as were prohibited by California law. *Merchants Home, supra,* 50 F.3d at 1492.

Merchants Home, as extended herein, affords little, if any, McCarran-Ferguson Act protection to a defendant who is sued for violating RICO in a context involving a regulated aspect of the "business of insurance." Moreover, *Merchants Home* is not accepted by other courts of appeals which have considered this issue. See *Kenty v. Bank One, Columbus, N.A.,* 92 F.3d 384, 392 (6th Cir. 1996)

(McCarran-Ferguson Act precluded RICO action against insurance company because "different liability under Ohio law for violations, as well as different standards of proof necessary to demonstrate misrepresentations, means that RICO does impair the ability of Ohio to regulate this type of behavior"); *Ambrose v. Blue Cross & Blue Shield of Virginia,* 891 F.Supp. 1153 (E.D. Va. 1995), *aff'd without opp.,* 95 F.3d 41 (4th Cir. 1996) (McCarran-Ferguson Act precluded RICO action against insurance company because the "forum for redress would shift from [Virginia's State Corporation Commission] to the federal courts").

District courts in California, with one exception, have held that the McCarran-Ferguson Act precludes RICO suits where the business of insurance is involved. Compare *Gordon v. Ford Motor Credit Co.,* 868 F.Supp. 1191 (N.D.Cal. 1992) and *LeDuc v. Kentucky Cen. Life Ins. Co.,* 814 F.Supp. 820 (N.D.Cal. 1992) with *Thacker v. New York Life Ins. Co.,* 796 F.Supp. 1338 (E.D.Cal. 1992).

In *Gordon v. Ford Motor Credit Co., supra,* 868 F.Supp. at 1196-97, the court stated:

> "California has enacted comprehensive legislation expressly designed to regulate the business of insurance." . . . Thus, this court finds that California has enacted laws regulating the activities being challenged. Furthermore, given California's extensive regulation of the insurance industry, this court concludes that application of RICO would impair, invalidate, and supersede the body of substantive laws which California has enacted to govern insurance practices in this state.

In *LeDuc v. Kentucky Central Life Insurance Co., supra,* 814 F.Supp. at 829, the court stated:

> The application of a federal statute to matters regulated by state insurance law would arguably impair state law. For instance, RICO violations include treble damages and attorneys' fees. The California Legislature has not provided such remedies for misrepresentations regarding an insurance company's financial condition. In fact, applying RICO would nullify the state's determination of the appropriate remedies for certain conduct and would supersede remedies and regulatory supervision provided by California law.

District courts in other states have reached identical conclusions. *See, e.g., Doe v. Norwest Bank Minnesota, N.A.,* 909 F.Supp. 668, 673 (D. Minn. 1995) (rejecting *Merchants Home*); *Ambrose v. Blue Cross & Blue Shield of Virginia, supra* (rejecting *Merchants Home*); *Forsyth v. Humana, Inc.,* 827 F.Supp. 1498, 1520 (D.Nev. 1993), *aff'd in part, rev'd in part,* 99 F.3d 1504 (9th Cir. 1996); *Wexco, Inc. v. IMC, Inc.,* 820 F.Supp. 194, 203-4 (M.D. Pa. 1993); *Everson v. Blue Cross & Blue Shield of Ohio,* 898 F.Supp. 532, 542-45 (N.D. Ohio 1994). In *Doe, supra,* the court stated:

> A much more difficult question is presented when the Court considers whether the application of RICO to the conduct in question would "invalidate, impair or supersede" the comprehensive Minnesota legal regulation of insurance, but it is not thoroughly considered by the parties. Plaintiffs argue that Minnesota law does not allow a private cause of action for violations of the Minnesota Unfair Claims Practices Act, and that permitting such a claim in a RICO

action would allow a remedy in federal court that is not available in state court. This would not invalidate or supersede the state law, but it may impair it.

In *Merchant's Home Delivery, supra,* the Court rejected an argument like the one presented by Plaintiffs herein. It concluded that although the practices in question were the "business of insurance," the RICO action was not preempted because allowing the additional remedies of RICO leaves the state laws intact. It concluded that Congress had not intended "to allow states to preempt the field in the regulation of the business of insurance." 50 F.3d at 1491. The Court stated:

"If Congress had intended to cede the field, it could have said: 'No federal statute shall be construed to *apply* to the business of insurance.' Instead, it allowed federal statutes to apply unless they conflict with the states' statutes." 50 F.3d at 1492. (Emphasis in original.) The parties do not discuss this holding in *Merchant's Home Delivery.*

The Court of Appeals for the Eighth Circuit has not reached a conclusion on this issue. It is unclear whether that Court would adopt the reasoning of the Ninth Circuit, or would reach a different conclusion, perhaps persuaded by the reasoning of the District Courts in the cases considered below.

In *Wexco Inc.*, the Court reasoned:

> "The availability of a federal private action under RICO would not merely nullify the state's chosen regulatory remedies for insurance entity misconduct. Rather, this

> court believes that the availability of a federal private remedy which would reward successful business plaintiffs, such as the captioned parties, with treble damages, costs and attorney fees cannot help but upset the balance of relationships between insurance entities and insureds which are established and regulated [by the State]."

Wexco, supra, 820 F.Supp. at 204. The Court reached a similar conclusion in *Forsyth v. Humana, Inc., supra,* 827 F.Supp. at 1521-1522. *See also LeDuc v. Kentucky Central Life Ins. Co., supra,* 814 F.Supp. at 829.

> There is substantial debate concerning the ever expanding use of the Racketeer Influenced and Corrupt Organizations Act to reach activity which seems removed from the criminal enterprises which were the principal focus when it was adopted. With that in mind, and in a legal environment raising renewed issues of federalism, *it is concluded that the Congress would not have intended that comprehensive state regulation of insurance would be supplemented by the remedies in RICO.* Rather, the preemption of the McCarran-Ferguson Act should be applied to the claims brought in this action against Voyager Guaranty Insurance Company. [Emphasis added]

It is the Court alone which now has the jurisdiction to put an end to this "substantial debate," and to resolve the ever increasing division among the federal courts over RICO's availability in litigation concerning aspects of the "business of insurance" which are regulated by state law. No more fitting case exists to deal with this issue than this case where, on the one hand, California law has made unequivocally clear its position as to the

inapplicability of civil tort litigation and RICO in the workers' compensation system, and where, on the other hand, the Ninth Circuit has simply ignored this California law in its interpretation of McCarran-Ferguson Act inapplicability.

III.

The Decision Of The Court Below Apparently Conflicts With Relevant Decisions Of the Court Which Have Construed The McCarran-Ferguson Act In Connection with The Business of Insurance

Petitioners submit that the decision of the court below appears to be in conflict with the Court's precedents. If so, a further basis for granting certiorari exists. *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 [102 S.Ct. 2118, 2121, 2122, 72 L.Ed.2d 520] (1982).

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, was passed by Congress in 1945. Its purpose was two-fold: one, to preclude application of federal law to activities involving the "business of insurance" where the purpose of state law is to regulate such activities; and two, to provide a limited exemption from federal antitrust laws to insurance companies for conduct by insurance companies which constitutes the "business of insurance." 15 U.S.C. § 1012(b). Section 1012(b) reads, in pertinent part:

> No act of Congress shall be construed to invalidate, impair or superseded any law enacted by any state for the purpose of regulating the business of insurance. . . .

According to the most recent pronouncement by the Court, the term "business of insurance," as used in the McCarran-Ferguson Act, is to be construed *narrowly* where antitrust exemption for insurance company conduct is involved, and *broadly* when state law regulation of the "business of insurance" is involved. *U.S. Dept. of Treasury v. Fabe,* 508 U.S. 491, 505-508 [113 S.Ct. 2202, 2210-2212, 124 L.Ed.2d 449] (1993). Because this case involves activities regulated by state law, not insurance company antitrust conduct, the broad construction of the term "business of insurance" must be used.

Consistent with this mandate is the Court's prior conclusion that the "claims adjustment process" involves the "business of insurance." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 133 n.8 [102 S.Ct. 3002, 3011 n.8, 73 L.Ed.2d 647] (1982). The court below obviously reached the same conclusion.

The apparent conflict arises because the court below, though acknowledging it was dealing with the "business of insurance," went on to conclude that RICO does not "impair, invalidate or supersede" a state law remedial process which state law has held to be *exclusive.* How, consistent with *Fabe,* can a federal remedy be imposed upon a state's exclusive remedial process and not be held to "impair, invalidate or supersede" that process? The answer seems obvious. It cannot. That is especially true when a state appellate court has held that application of RICO to the state's workers' compensation system would "impair, invalidate or supersede" state law. *American International Corp. Inc. v. Superior Court, supra.*

Though petitioners recognize that the Court has not yet addressed the issue of how a court is to determine whether a federal law "impairs, invalidates or supersedes" state law, *Fabe* has defined a standard by which it can be said that, unless antitrust issues are involved, the McCarran-Ferguson Act is to be liberally construed in favor of application so as to preclude use of a federal law where state regulation of the "business of insurance" is involved.

IV.

The Decision Of The Court Below Opens The Door To Federal Court Forum Shopping In California

The court below has opened the federal courts in the Ninth Circuit to RICO suits by anyone who believes he or she has suffered a wrong within a state's workers' compensation system. That is the undeniable conclusion of the Ninth Circuit trilogy of opinions in *Merchants Home Delivery Service, Inc. v. Frank B. Hall, supra,* this case and, most recently, *Forsyth v. Humana, Inc.*, 99 F.3d 1504 (9th Cir. 1996). What cannot be claimed in a California state court under state tort law is now available across the street in a federal court.

RICO is not, and was never intended to be, a part of California's workers' compensation system. If it is ever to be a part of that system, it is the California legislature which must make that decision, not the court below. Indeed, in light of California law, it is difficult to perceive a more appropriate case for application of the McCarran-Ferguson Act than this case.

The time is ripe to resolve this federal jurisdiction issue. Practitioners in the Ninth Circuit and throughout the United States deserve such resolution. Indeed, if the Ninth Circuit's position is allowed to stand, it is arguable that counsel for American International Adjustment Co. may have committed malpractice by filing a civil tort suit in state court as opposed to filing a RICO suit in federal court. If, however, the Ninth Circuit is correct, then RICO ought to be available as an additional remedy throughout the United States, not just in the Ninth Circuit.

V.

At A Minimum Certiorari Should Be Granted And The Case Ordered Remanded To The Court Below In Light Of The Decision By The California Court of Appeal In American International Adjustment Co. Inc. v. Crawford, ___ Cal.App.4th ___, [60 Cal.Rptr.2d 123] (1997)

Subsequent to the court below's decision herein, and its denial of petitioner's timely petition for rehearing, the California Court of Appeal issued its opinion in *American International Adjustment Co., Inc. v. Crawford, supra.* In that case, the court held that civil suits such as that brought by Zenith to recover damages resulting from alleged fraudulent billing practices in California's workers' compensation system *cannot* be brought. Rather, the *exclusive* method for dealing with alleged fraudulent billing practices within California's workers' compensation system is to be found under California law. As stated by the court:

> Fraudulent workers' compensation claims should be stopped at the source, in the workers' compensation system. Medical clinics that submit false medical-legal evaluations can be

> detected and halted under existing law, which sets up a tripartite scheme involving the WCAB, the insurance commissioner and public prosecutors.

Id. at 126.

Because *American International Adjustment Co.* was decided after the court below decided this matter, and after the petitioner's petition for rehearing was denied, petitioners did not have an opportunity to bring this decision to the court below's attention within the specified jurisdictional time period. Petitioners did attempt to bring this case to the attention of the court below by filing a motion for permission to file a second petition for rehearing. That motion was denied on February 5, 1997. (Appendix D).

In *Exxon Co. U.S.A. v. Banque de Paris et des Pays-Bas,* 488 U.S. 920 [109 S.Ct. 299, 102 L.Ed.2d 319] (1988) the Court granted a petition for certiorari and then remanded the case to the court of appeals for the Fifth Circuit because of a recent Texas intermediate appellate court decision. At a minimum, that same procedure is warranted herein.

CONCLUSION

For the reasons stated above, petitioners request that their petition for a writ of certiorari be granted.

DATED: February 19, 1997

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY,

Plaintiff-Counter-defendant-Appellant/Cross-Appellee,

v.

JAMES W. EISENBERG, an individual; JAMES W. EISENBERG, M.D., a California corporation, d/b/a AMERIMED MEDICAL CORPORATION; ELEVENTH AVENUE MEDICAL GROUP; EAST L.A. COUNTY MEDICAL GROUP; VALLEY RIDGE MEDICAL GROUP; BAY MEDICAL GROUP and SAND POINT MEDICAL GROUP; LIEN COLLECTION, INC.,

Defendants-Counter-claimants-Appellees/Cross-Appellants,

and

Nos. 94-55983
94-56188
94-56138

D.C. No.
CV-92-06267-AAH
(VT)

MEMORANDUM*

(Filed
Oct. 11, 1996)

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

MICHAEL J. LIGHTMAN; EXCALIBUR VENTURES, INC., d/b/a CIVIC CENTER MANAGEMENT; ROBERT YALE LIBOTT, an individual; and ROBERT YALE LIBOTT, a law corporation, d/b/a CIVIC LAW CENTER,

Defendants-Counter-claimants-Appellees.

Appeal from the United States District Court for the Central District of California A. Andrew Hauk, District Judge, Presiding

Argued and Submitted January 11, 1996 Pasadena, California

Filed

Before: BRIGHT,** NORRIS and WIGGINS, Circuit Judges

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, provides that state laws enacted for the purpose of regulating the insurance industry inversely preempt federal laws of general applicability.[1] 15 U.S.C.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

[1] Section 2 of the Act provides, in relevant part:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

§ 1012. In *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir. 1995), we held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, was not inversely preempted by the California statutes regulating insurance because both the California insurance statutes and RICO prohibited the same fraudulent acts. This case is squarely controlled by *Merchants Home*, although the state insurance laws at issue are workers' compensation insurance laws.

Appellant Zenith Insurance Company ("Zenith") issues workers' compensation insurance policies to employers. In October 1992, it filed an action in the district court against appellees James Eisenberg, a doctor, Robert Yale Libott, a lawyer, Michael Lightman, a manager, and appellee corporations owned or managed by one of the three individual appellees. In its complaint, Zenith alleged that appellees violated RICO and state fraud laws. Zenith's factual allegations fell into two main categories. First, Zenith alleged that appellees recruited uninjured workers to file bogus workers' compensation claims against their employers. Second, Zenith alleged that appellees submitted fraudulently inflated bills for medical and legal services that appellees provided to injured and uninjured workers.

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012.

Appellees moved to dismiss Zenith's RICO claims on the ground that they were inversely preempted by state law under the McCarran-Ferguson Act. The district court granted the motion without a statement of reasons. The court also dismissed Zenith's pendent state law claims without prejudice.

While the case was pending on appeal, our court decided *Merchants Home*. In *Merchants Home*, a national shipping company retained an insurance broker to secure insurance policies and to process claims for which the company self-insured. The company claimed that the insurance broker had defrauded it in three ways: (1) by overbilling for premiums on actual insurance policies, (2) by billing for premiums on fictitious policies, and (3) by billing for self-insured claims that were never paid to claimants. *Merchants Home*, 50 F.3d at 1488. The question presented was whether the McCarran-Ferguson Act precluded application of RICO on the facts of the case.

The McCarran-Ferguson Act precludes the application of a federal statute if: (1) the statute does not "specifically relate" to the business of insurance, (2) the acts challenged under the statute constitute the business of insurance, (3) the state has enacted a law or laws regulating the challenged acts, and (4) the state law would be superseded, impaired or invalidated by application of the federal statute. *Id.* at 1489. All four factors must be satisfied. *Id.*

In *Merchants Home*, our analysis centered, in part, on the fourth element. As to the question whether application of RICO would "invalidate, impair, or supersede" California law, we decided that "application of a federal statute prohibiting acts which are also prohibited under a

state's insurance laws does not 'invalidate, impair, or supersede' the state's laws under § 2(b) of the McCarran-Ferguson Act." *Id.* at 1492. Accordingly, we held that the shipping company's civil RICO action for insurance fraud was not preempted by state law under the McCarran-Ferguson Act.

This case, like *Merchants Home*, involves allegations of insurance fraud. Specifically, Zenith alleges (1) that appellees recruited uninjured workers to file fictitious workers' compensation claims insured by Zenith, and (2) that appellees overbilled Zenith for medical and legal services to workers whose employers were insured by Zenith. Also like *Merchants Home*, the case involves alleged fraudulent practices that are prohibited both under California law and under the federal RICO statute.

We hold that this case is controlled by *Merchants Home* because there is no principled basis for distinguishing, for McCarran-Ferguson Act purposes, between the alleged insurance fraud in that case and the alleged insurance fraud in this case. And *Merchants Home* instructs that in a case such as this, RICO does not impermissibly "invalidate, impair, or supersede" California law. Accordingly, the McCarran-Ferguson Act does not prohibit application of RICO in this case.

Appellees argue that application of RICO would "impair" California law because Zenith's action for damages "would upset the delicate balance established by the California Legislature" when it created the workers' compensation system. Appellees' Br. at 22. This argument is, however, foreclosed by *Merchants Home*. In that case, the defendant made a similar argument: to wit, that a private action under civil RICO "would upset the balance struck

by California's insurance code, which, in general, allows only administrative enforcement and actual damages." *Merchants Home*, 50 F.3d at 1491 (citation omitted). We rejected this argument and adopted the Seventh Circuit's rule that "state and federal laws proscribing identical conduct do not conflict with or displace each other, and may coexist under the McCarran-Ferguson Act." *Id.* at 1492 (citing *National Ass'n for the Advancement of Colored People v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992)).

We also explained in *Merchants Home* that the language of the McCarran-Ferguson Act is inconsistent with appellees' "delicate balance" argument.

> First, [the Act's] exemption of federal laws which specifically relate to the business of insurance weighs against a congressional intent wholly to abandon the field to the states. Second, only federal statutes which "invalidate, impair, or supersede" state insurance statutes are "preempted." If Congress had intended to cede the field, it could have said: "No federal statute shall be construed to *apply* to the business of insurance." Instead, it allowed federal statutes to apply unless they conflict with the states' statutes.

Id.

Following *Merchants Home*, we **REVERSE** the judgment and **REMAND** for further proceedings.[2]

---

[2] We construe the district court's order of June 14, 1994 as a stay pending appeal, which dissolves upon filing of this disposition.

APPENDIX B

RONALD M. GREENBERG (SBN 035953)
RONALD M. GREENBERG, A Professional Corporation

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Attorneys for Defendants and Counterclaimants
MICHAEL J. LIGHTMAN, EXCALIBUR VENTURES, INC. and LIEN COLLECTIONS, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ZENITH INSURANCE COMPANY, a California corporation, Plaintiff, v. JAMES W. EISENBERG, etc., et al., Defendants. AND RELATED CROSS ACTIONS.	CASE NO. CV 92 6267 AAH(Tx) ORDER (Filed Jun. 14, 1994)

On Monday, May 16, 1994, defendants' Motion to Dismiss and Motion for Abstention and plaintiff's Motion to Confirm Jurisdiction came on regularly for hearing

before this Court. Lary A. Rappaport appeared as counsel for plaintiff; Robert F. Mangels and Michael Goch appeared as counsel for defendants James W. Eisenberg and James W. Eisenberg Medical Corporation; Ronald M. Greenberg and Mitchell D. Kamarck appeared as counsel for Michael J. Lightman, Excalibur Ventures, Inc. and Lien Collections, Inc.; and Donald C. Smaltz appeared as counsel for Robert Yale Libott and Robert Yale Libott, A Law Corporation.

After full consideration of the moving papers, oppositions thereto, the arguments of counsel and the pleadings, papers, records and exhibits on file in this case:

IT IS HEREBY ORDERED that plaintiff's first and second claims for relief are dismissed with prejudice; and, plaintiff's third and fourth claims for relief are dismissed without prejudice.

IT IS FURTHER ORDERED that the respective counterclaims of Lien Collections, Inc. and James W. Eisenberg Medical Corporation are voluntarily dismissed without prejudice.

Dated: 6/14/94

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES
DISTRICT JUDGE

Submitted by:

RONALD M. GREENBERG
RONALD M. GREENBERG, A Professional Corporation

MITCHELL D. KAMARCK
ROSENFELD, MEYER & SUSMAN

By /s/ Mitchell Kamarck
Mitchell D. Kamarck
Attorneys for Michael J. Lightman
Excalibur Ventures, Inc. and
Lien Collections, Inc.

ROBERT E. MANGELS
JEFFER, MANGELS, BUTLER & MARMARO

and

MICHAEL GOCH

By /s/ Robert Mangels (by MDK)
Robert E. Mangels
Attorneys for Defendants and
Counterclaimants James W. Eisenberg
and James W. Eisenberg Medical Corporation

DONALD C. SMALTZ
WILLIAM F. FAHEY
EMILY A. BRECKENRIDGE
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By /s/ Donald Smaltz (by MDK)
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APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY, Plaintiff-Counter-defendant-Appellant, v. JAMES W. EISENBERG, n individual; JAMES W. EISENBERG, M.D., a California corporation, d/b/a AMERIMED MEDICAL CORPORATION, ELEVENTH AVENUE MEDICAL GROUP, BAY MEDICAL GROUP, and SAND POINT MEDICAL GROUP; MICHAEL J. LIGHTMAN; EXCALIBUR VENTURES, INC., d/b/a CIVIC CENTER MANAGEMENT; ROBERT YALE LIBBOTT, an individual; and ROBERT YALE LIBBOTT, a law corporation, d/b/a a CIVIC LAW CENTER, Defendants-Counter-claimants-Appellees.	Nos. 94-55983 94-56188 94-56138 D.C. No. CV-92-06267-AAH (VT) **ORDER** (Filed Nov. 21, 1996)

Before: NORRIS, WIGGINS, and BRIGHT,* Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judge Wiggins has voted to reject the suggestion for a rehearing en banc, and Judges Norris and Bright have recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED,** and the suggestion for a rehearing en banc is **REJECTED.**

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY, Plaintiff-Counter-defendant-Appellant, v. JAMES W. EISENBERG, an individual; JAMES W. EISENBERG, M.D., a California corporation, d/b/a AMERIMED MEDICAL CORPORATION, ELEVENTH AVENUE MEDICAL GROUP, BAY MEDICAL GROUP, and SAND POINT MEDICAL GROUP; MICHAEL J. LIGHTMAN; EXCALIBUR VENTURES, INC., d/b/a CIVIC CENTER MANAGEMENT; ROBERT YALE LIBBOTT, an individual; and ROBERT YALE LIBBOTT, a law corporation, d/b/a a CIVIC LAW CENTER, Defendants-Counter-claimants-Appellees.	Nos. 94-55983 94-56188 94-56138 D.C. No. CV-92-06267-AAH (VT) **ORDER** (Filed Feb. 5, 1997)

Before: NORRIS, WIGGINS, and BRIGHT,* Circuit Judges

Appellees' Motion For Leave to File Second Petition For Rehearing and Suggestion For Rehearing En Banc is **DENIED.**

---

* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX E

McCarran-Ferguson Act, Relevant Provisions

15 U.S.C. § 1011.

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012.

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX F

Racketeer Influenced and Corrupt Organization Act. Relevant Provisions

18 U.S.C. § 1964.

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

APPENDIX G

California Workers' Compensation Act, Relevant Provisions

§ 3201.

This division and Division 5 (commencing with Section 6300) are expression of the police power and are intended to make effective and apply to a complete system of workers' compensation the provisions of Section 4 of Article XIV of the California constitution.

* * *

§ 3602.

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

* * *

§ 3700.

Every employer except the state shall secure the payment of compensation in one or more the following ways:

(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this state.

* * *

§ 3753.

The person entitled to compensation may, irrespective of any insurance or other contract, except as otherwise provided in this division, recover such compensation directly from the employer. In addition thereto, he may enforce in his own name, in the manner provided by this division the liability of any insurer either by making the insurer a party to the original application or by filing a separate application for any portion of such compensation.

* * *

§ 3755.

If the employer is insured against liability for compensation, and if after the suffering of any injury the insurer causes to be served upon any compensation claimant a notice that it has assumed and agreed to pay any compensation to the claimant for which the employer is liable, such employer shall be relieved from liability for compensation to such claimant upon the filing of a copy of such notice with the appeals board. the insurer shall, without further notice, be substituted in place of the employer in any proceeding theretofore or thereafter instituted by such claimant to recover such compensation, and the employer shall be dismissed therefrom.

Such proceedings shall not abate on account of such substitution but shall be continued against such insurer.

* * *

§ 4621.

(a) In accordance with the rules of practice and procedure of the appeals board, the employee, or the dependents of a deceased employee, shall be reimbursed for his or her medical-legal expenses and reasonably, actually, and necessarily incurred, except as provided in Section 4064. The reasonableness of, and necessity for, incurring these expenses shall be determined with respect to the time when the expenses were actually incurred. Costs for medical evaluations, diagnostic tests, and interpreters' services incidental to the production of a medical report shall not be incurred earlier than the date of receipt of by the employer, the employer's insurance carrier, or, if represented, the attorney of record, of all reports and documents required by the administrative director incidental to the services. This subdivision is not applicable unless there has been compliance with Section 4620.

* * *

§ 4625.

(a) Notwithstanding subdivision (d) of Section 4628, all charges for medical-legal expenses for which the employer is liable that are not in excess of those set forth

in the official medical-legal fee schedule adopted pursuant to Section 5307.6 shall be paid promptly pursuant to Section 4622.

(b) If the employer contests the reasonableness of the charges it has paid, the employer may file a petition with the appeals board to obtain reimbursement of the charges from the physician that are considered to be unreasonable.

* * *

§ 4906.

(a) No charge, claim, or agreement for the legal services or disbursements mentioned in subdivision (a) of Section 4903, or for the expense mentioned in subdivision (b) of Section 4903, is enforceable, valid, or binding in excess of a reasonable amount. The appeals board may determine what constitutes a reasonable amount.

(b) No attorney or agent shall demand or accept any fee from an employee or dependent of an employee for the purpose of representing the employee or dependent of an employee in any proceeding of the division, appeals board, or any appellate procedure related thereto until the amount of the fee has been approved or set by the appeals board.

(c) Any fee agreement shall be submitted to the appeals board for approval within 10 days after the agreement is made.

(d) In establishing a reasonable attorney's fee, consideration shall be given to the responsibility assumed by

the attorney, the care exercised in representing the applicant, the time involved, and the results obtained.

* * *

§ 5300.

All the following proceedings shall be instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4:

(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto.

(b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon the employer by this division in favor of the injured employee, his or her dependents, or any third person.

(c) For the determination of any question as to the distribution of compensation among dependents or other persons.

(d) For the determination of any question as to who are dependents of any deceased employee, or what persons are entitled to any benefit under the compensation provisions of this division.

(e) For obtaining any order which by Division 4 of the appeals board is authorized to make.

(f) For the determination of any other matter, jurisdiction over which is vested by Division 4 in the Division of Workers' Compensation, including the administrative director and the appeals board.

§ 5301.

The appeals board is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the courts as specified in this division.

* * *

APPENDIX H

CALIFORNIA INSURANCE CODE, RELEVANT PROVISIONS

§ 1871.4.

(a) It is unlawful to do any of the following:

(1) Make or cause to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code.

(2) Present or cause to be presented any knowingly false or fraudulent written or oral material statement in support of, or in opposition to, any claim for compensation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code.

(3) Knowingly assist, abet, conspire with, or solicit any person in an unlawful act under this section.

(4) Make or cause to be made any knowingly false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from claiming benefits or pursuing a claim.

For the purposes of this subdivision, "statement" includes, but is not limited to, any notice, proof of injury, bill for services, payment for services, hospital or doctor records, X-ray, test results, medical-legal expense as defined in Section 4620 of the Labor Code, other evidence of loss, injury, or expense, or payment.

(b) Every person who violates subdivision (a) shall be punished by imprisonment in county jail for one year, or in the state prison, for two, three, or five years, or by a

fine not exceeding fifty thousand dollars ($50,000) or double the value of the fraud, whichever is greater, or by both imprisonment and fine. Restitution shall be ordered, including restitution for any medical evaluation or treatment services obtained or provided. The court shall determine the amount of restitution and the person or persons to whom the restitution shall be paid.

(c) Any person who violates subdivision (a) and who has a prior felony conviction of that subdivision, of former Section 556, of former Section 1871.1, or of Section 548 or 550 of the Penal Code, shall receive a two-year enhancement for each prior conviction in addition to the sentence provided in subdivision (b).

The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(d) This section shall not be construed to preclude the applicability of any other provision of criminal law that applies or may apply to any transaction.

§ 1871.5.

Any person convicted of workers' compensation fraud pursuant to Section 1871.4 or Section 550 of the Penal Code shall be ineligible to receive or retain any compensation, as defined in Section 3207 of the Labor Code, where that compensation was owed or received as

a result of a violation of Section 1871.4 or Section 550 of the Penal Code for which the recipient of the compensation was convicted.

* * *

§ 1871.7.

(a) It is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to Division 4 (commencing with Section 3200) of the Labor Code or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer.

(b) Every person who violates any provision of this section or Section 549, 550, or 551 of the Penal Code shall be subject, in addition to any other penalties that may be prescribed by law, to a civil penalty of not less than five thousand dollars ($5,000) nor more than ten thousand dollars ($10,000), plus an assessment of not more than three times the amount of each claim for compensation, as defined in Section 3207 of the Labor Code or pursuant to a contract of insurance. The court shall have the power to grant other equitable relief, including temporary injunctive relief, as is necessary to prevent the transfer, concealment, or dissipation of illegal proceeds, or to protect the public.

(c) The penalties set forth in subdivision (b) are intended to be remedial rather than punitive, and shall not preclude, nor be precluded by, a criminal prosecution

for the same conduct. If the court finds, after considering the goals of disgorging unlawful profit, restitution, compensating the state for the costs of investigation and prosecution, and alleviating the social costs of increased insurance rates due to fraud, that such a penalty would be punitive and would preclude, or be precluded by, a criminal prosecution, the court shall reduce that penalty appropriately.

(d) The Attorney General, district attorney, or commissioner may bring a civil action under this section. Before the commissioner may bring that action, the commissioner shall be required to present the evidence obtained to the appropriate local district attorney for possible criminal or civil filing. If the district attorney elects not to pursue the matter due to insufficient resources, then the commissioner may proceed with the action.

(e)(1) Any interested persons may bring a civil action for a violation of this section for the person and for the State of California. The action shall be brought in the name of the state. The action may be dismissed only if the court and the Attorney General, the district attorney, or the commissioner, whichever is participating, give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Attorney General, local

district attorney, or commissioner may elect to intervene and proceed with the action within 60 days after he or she receives both the complaint and the material evidence and information. If more than one governmental entity elects to intervene, the Attorney General shall have precedence, followed by the district attorney.

(3) The Attorney General, district attorney, or commissioner may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). The motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Attorney General, district attorney, or commissioner shall either:

(A) Proceed with the action, in which case the action shall be conducted by the Attorney General, district attorney, or commissioner.

(B) Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person or governmental agency brings an action under this section, no person other than the Attorney General, district attorney, or commissioner may intervene or bring a related action based on the facts underlying the pending action unless that action is authorized by another statute or common law.

(f)(1) If the Attorney General, district attorney, or commissioner proceeds with the action, he or she shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. That person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Attorney General, district attorney, or commissioner may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Attorney General, district attorney, or commissioner of the filing of the motion, and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Attorney General, district attorney, or commissioner may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the hearing may be held in camera.

(C) Upon a showing by the Attorney General, district attorney, or commissioner that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's, district attorney's, or commissioner's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, including, but not limited to, the following:

(i) Limiting the number of witnesses the person may call.

(ii) Limiting the length of the testimony of those witnesses.

(iii) Limiting the person's cross-examination of witnesses.

(iv) Otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Attorney General, district attorney, or commissioner elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Attorney General, district attorney, or commissioner so requests, he or she shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts, at the Attorney General's, district attorney's, or commissioner's expense. When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Attorney General, district attorney, or commissioner to intervene at a later date upon a showing of good cause.

(4) If at any time both a civil action for penalties and equitable relief pursuant to this section and a criminal action are pending against a defendant for substantially the same conduct, whether brought by the government or a private party, the civil action shall be stayed until the criminal action has been concluded at the trial court level. The stay shall not preclude the court from granting or enforcing temporary equitable relief during the pendency of the actions. Whether or not the Attorney General, district attorney, or commissioner proceeds with the action, upon a showing by the Attorney General, district attorney, or commissioner that certain actions of discovery by the person initiating the action would interfere with a law enforcement or governmental agency investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay discovery for a period of not more than 180 days. A hearing on a request for the stay shall be conducted in camera. The court may extend the 180-day period upon a further showing in camera that the agency has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subdivision (e), the Attorney General, district attorney, or commissioner may elect to pursue its claim through any alternate remedy available to the Attorney General, district attorney, or commissioner.

(g)(1) If the Attorney General, district attorney, or commissioner proceeds with an action brought by a person under subdivision (e), that person shall, subject to the

second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Whether the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award those sums that it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(2) If the Attorney General, district attorney, or commissioner does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages. Except as provided in this paragraph, the amount shall not be less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of the proceeds. If the person bringing the action has paid money to the defendant as a result of a violation

of this section, then he or she shall be entitled to up to double the amount paid to the defendant if that amount is greater than 30 percent of the proceeds. That person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All of those expenses, fees, and costs shall be awarded against the defendant.

(3) If a local district attorney has proceeded with an action under this section, one-half of the penalties not awarded to a private party, as well as any costs awarded shall go to the treasurer of the appropriate county. Those funds shall be used to investigate and prosecute fraud, augmenting existing budgets rather than replacing them. All remaining funds shall go to the state and be deposited in the General Fund and, when appropriated by the Legislature, shall be apportioned between the Department of Justice and the Department of Insurance for enhanced fraud investigation and prevention efforts.

(4) Whether or not the Attorney General, district attorney, or commissioner proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of this section, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the Attorney General, district attorney, or commissioner to continue the action on behalf of the state.

(5) If the Attorney General, district attorney, or commissioner does not proceed with the action, and the person bringing the action conducts the action, the court

may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(h)(1) In no event may a person bring an action under subdivision (e) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the Attorney General, district attorney, or commissioner is already a party.

(2)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Attorney General, district attorney, or commissioner before filing an action under this section which is based on the information.

(i) Except as provided in subdivision (j), the Attorney General, district attorney, or commissioner is not liable for expenses that a person incurs in bringing an action under this section.

(j) In civil actions brought under this section in which the Attorney General, the Insurance Commissioner, or a district attorney is a party, the court shall retain discretion to impose sanctions otherwise allowed by law, including the ability to order a party to pay expenses as provided in Sections 128.5 and 1028.5 of the Code of Civil Procedure.

* * *

§ 1877.

This article shall be known and may be cited as the Workers' Compensation Insurance Fraud Reporting Act.

* * *

§ 1877.3.

(a) Upon written request to an insurer by an authorized governmental agency, an insurer, or agent authorized by that insurer to act on behalf of the insurer, shall release to the requesting authorized governmental agency any or all relevant information deemed important to the authorized governmental agency that the insurer may possess relating to any specific workers' compensation insurance fraud investigation.

(b)(1) When an insurer knows or reasonably believes it knows the identity of a person or entity whom it has reason to believe committed a fraudulent act relating to a workers' compensation insurance claim or a workers' compensation insurance policy, including any policy application, or has knowledge of such a fraudulent act that is reasonably believed not to have been reported

to an authorized governmental agency, then, for the purpose of notification and investigation, the insurer, or agent authorized by an insurer to act on its behalf, shall notify the local district attorney's office and the Bureau of Fraudulent Claims of the Department of Insurance, and may notify any other authorized governmental agency of that suspected fraud and provide any additional information in accordance with subdivision (a). The insurer shall state in its notice the basis of the suspected fraud.

* * *

APPENDIX I

REPORTER'S TRANSCRIPT, EXCERPT

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[p. 14] MR. RAPPAPORT: YOUR HONOR, THE PROBLEM IS THAT THE DAMAGES WHICH HAVE BEEN SUFFERED BY ZENITH INSURANCE COMPANY ARE THE DAMAGES WHICH THEY HAVE TO INCUR AS AN INSURER IN INVESTIGATING AND DEFENDING AGAINST CLAIMS.

THE COURT: THAT'S PART OF THE JOB. THAT'S PART OF THE BUSINESS OF INSURANCE, INVESTIGATION OF FRAUDS.

MR. RAPPAPORT: WHEN A FRAUDULENT LIEN IS SUBMITTED, ZENITH – THE BEST IT COULD DO IS TO DEFEAT THE FRAUDULENT LIEN. IT IS DAMAGED IN DOING SO AND THERE'S NO RECOMPENSE BEFORE THE WORKERS COMPENSATION APPEALS BOARD.

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